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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

WILLIAM D. WEST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the 50,000 airline passengers who are involuntarily denied boarding each year pursuant to a uniform federally-approved system may sue under differing state laws, or whether these state laws are expressly preempted by section 1305 of the Airline Deregulation Act.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Northwest Airlines, Inc. ("Northwest")[1] requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on June 3, 1993 (superseding its amended February 5, 1991 opinion), which affirmed in part, and reversed and remanded in part, the judgment

[1] Pursuant to Rule 29.1 of this Court, petitioner states that Northwest does not have corporate parents or subsidiaries, the shares of which are publicly traded.

of the United States District Court for the District of Montana.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on June 3, 1993, is reported at 995 F.2d 148, and reprinted in Petitioner's Appendix ("App") A-1. The unpublished order of the Court of Appeals, dated August 20, 1993, denying petitioner's timely petition for rehearing is reprinted at App. G-1. The memorandum order of The Supreme Court of the United States, granting Northwest's petition for certiorari, and remanding to the Ninth Circuit for further consideration in light of *Morales v. Trans World Airlines, Inc.*, is reported at 112 S. Ct. 2031 (1992), and reprinted at App. B-1. The memorandum order of The Supreme Court of the United States, denying West's petition for certiorari, is reported at 112 S. Ct. 2938 (1992), and reprinted at App. C-1. The memorandum order of The Supreme Court of the United States, vacating the denial of West's petition for a writ of certiorari and granting West's petition, is reported at 112 S. Ct. 2986 (1992), and reprinted at App. D-1. The opinion of the United States Court of Appeals for the Ninth Circuit, dated February 5, 1991 (as amended), which was the subject of West's earlier petition and Northwest's earlier cross petition for certiorari, is reported at 923 F.2d 657, and is reprinted at App. E-1. The unpublished opinion and order of the United States District Court for the District of Montana is reprinted at App. L-1. An order denying West's petition for rehearing of the amended opinion, dated June 4, 1991, appears at App. I-1.

JURISDICTION

The judgment of the court of appeals was initially entered on June 3, 1993. Northwest timely filed a petition

for rehearing, which was denied on August 20, 1993. This petition is timely pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.4. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

PERTINENT STATUTES AND REGULATIONS

The Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), which added Section 105 to the Federal Aviation Act, as amended, now codified as 49 U.S.C. App. § 1305, and entitled "Federal Preemption" states:

> (a) Preemption
>
> 1) [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Section 250.9 of Title 14 of the Code of Federal Regulations (1991), entitled "Written Explanation of Denied Boarding Compensation and Boarding Practices," states, in relevant part:

> (a) Every carrier shall furnish passengers who are denied boarding involuntarily for flights on which they hold confirmed reserved space immediately after the denied boarding occurs, a written statement . . . .
>
> (b) The statement shall read as follows:
>
> * * * *

Passenger's Options

> Acceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

STATEMENT OF THE CASE

William D. West ("West"), an attorney, purchased an airline ticket from Great Falls, Montana, to Arlington, Virginia. Prior to West's departure, Northwest had made an economic decision to service Great Falls with a DC-9 which carries 68 fewer passengers than the 727 which previously landed there. When West arrived at the gate the flight was over-booked by five persons. Northwest found three "volunteers" who agreed to give up their seats in return for compensation from Northwest. West and another passenger were involuntarily denied boarding and were offered denied boarding compensation equal to 200% of the value of their tickets. The other passenger accepted the compensation but West rejected the offer. Northwest offered West an alternative flight which was scheduled to arrive at Dulles Airport, near his intended destination, six hours later than his originally scheduled flight. He declined this flight and chose to make the trip, using the same ticket, about two weeks later.

West sued, claiming $10,000 in compensatory damages and $50,000 in punitive damages, alleging that Northwest breached the covenant of good faith and fair dealing pursuant to the common law of Montana. The district court granted Northwest's motion for summary judgment and held that West's state law claims were preempted by 49 U.S.C. § 1305. West appealed.

On September 11, 1990, the Court of Appeals for the Ninth Circuit issued its first opinion, holding that neither West's claim for punitive damages nor his claim for compensatory damages was preempted. On February 5, 1991, the panel issued its second opinion holding, on rehearing, that West's claim for punitive damages *was* preempted as "inconsistent with applicable federal law" (App. E-7, 923 F.2d at 657, 661). His claim for compensatory damages was *not* preempted because the state common law was viewed as a law of general application, that is, it "was not addressed exclusively to airline service" (App. E-5, 923 F.2d at 660).

In both opinions, there was no dispute that Northwest's boarding and denied boarding services constituted "services" pursuant to § 1305 of the Airline Deregulation Act of 1978: "[W]e find that Northwest's passenger services, including boarding, are airline services within the meaning of § 1305" (App. E-4, 923 F.2d at 660; see also, App. A-9, 995 F.2d at 153).

West petitioned this Court for *certiorari*, claiming that he was entitled to punitive damages. Northwest cross-petitioned, claiming that all Montana state law relating to Northwest's services was preempted. This Court initially denied West's petition, granted Northwest's cross-petition, and remanded the case in light of its decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. __, 112 S. Ct. 2031 (1992). West applied for rehearing, arguing that Northwest's cross-petition could not be granted unless West's petition was also granted. Thereafter, this Court vacated its order denying West's petition and granted that petition as well, remanding West's case along with Northwest's case to the court of appeals for further consideration.

The court of appeals then rendered a third decision which, in the words of the dissenter, reached "the same

result as in the original opinion which the Court vacated" (App. A-8, 995 F.2d at 152).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Conflicts With This Court's Recent Decision in *Morales*

This appeal involves the important question of whether the approximately 50,000[2] airline passengers, who are *involuntarily* denied boarding each year pursuant to a nationwide uniform system administered by the Department of Transportation, may sue under the laws of the various states, or whether state laws related to bumping are preempted by the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305 et seq. ("ADA").

The three decisions of the ninth circuit in this case directly conflict with this Court's recent decision in *Morales*. The ninth circuit's third decision of June 3, 1993, is substantially similar to the one this Court previously vacated. This time, however, there was a dissent. As in the previous decision, all three judges held that the claim for punitive damages was preempted. In both the vacated second decision and the current one, the court of appeals recognized that denied boarding constituted an airline service within the meaning of § 1305 (App. E-4, 923 F.2d at 660; App. A-9, 995 F.2d at 153). The issue before the ninth circuit both times was whether the state law "related to" the service. In its second decision, the ninth circuit had found that compensatory damages were not preempted because "state

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[2] *The Wall Street Journal*, June 7, 1993, p. B-1, Col.6. See also, U.S. Department of Transportation, Air Travel Consumer Report, September 1993, p. 21.

laws that merely have an *effect* on airline services are not preempted"; only laws "addressed exclusively to airline service[s]" were preempted (App. at E-5; 923 F.2d at 660, emphasis in original).

Morales specifically rejected the ninth circuit's basis of decision.

> [P]etitioner advances the notion that only State laws specifically addressed to the airline industry are pre-empted, whereas [§ 1305] imposes no constraints on laws of general applicability. . . . We have consistently rejected this precise argument in our ERISA cases: "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." [112 S.Ct. at 2038]

After reviewing this Court's decision in *Morales*, the majority again denied preemption on the ground that Montana's common law was "too tenuously connected to airline regulation to trigger preemption" (App. A-5, 995 F.2d at 151).

As the dissent stated: "The majority now reaches the same result as in the original opinion which the Court vacated" (App. A-8, 995 F.2d at 152). "I do not believe *Morales* leaves room to doubt whether West's claim 'relates to' airline services. . ." (App. A-10; 995 F.2d at 154).[3]

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[3] The "too tenuously connected" standard was described in *Morales* to define what laws were not preempted since they did not "relate to" rates, routes or services. Previously, *Morales* declared that the key phrase in § 1305 was "relating to." "The ordinary meaning of these words is a broad one . . . and the words thus express a broad

(Footnote continued)

In *Morales*, this Court reviewed guidelines of the National Association of Attorneys General which purported to clarify various states' laws concerning deceptive advertising, including the type of notice which airlines were required to give to passengers in cases of overbooking. It sought to determine whether they related to airline "rates, routes, or services." It held that, pursuant to § 1305, they were preempted because they related to airline rates. The impact on the airlines in this case is much more pronounced, both concerning rates and services. Here, the various state laws would give 50,000 passengers, including West, the right to have a jury determine questions such as whether the decision to substitute a smaller DC-9 for a 727 satisfied the Montana common law standards of good faith and fair dealing, and, if not, the amount of compensation the airline must pay. Other jury questions might include whether Montana law imposed a duty on Northwest to call all passengers with reservations and advise them of the change from a 727 to a DC-9, or the fact that the DC-9 was overbooked. *Morales* held that the NAAG guidelines were preempted. The decision of the ninth circuit conflicts with that holding.

As stated in *Cipollone v. Liggett Group, Inc.*, __ U.S. __, 112 S.Ct. 2608, 2620 (1992):

> "[S]tate regulation can be effectively exerted through an award of damages as through some

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pre-emptive purpose" (112 S.Ct. at 2037). Then the Court discussed what laws did not "relate to" airline rates and, therefore, would not be preempted. State laws which affected an airline in "too tenuous, remote, or peripheral a manner" would not be preempted (112 S.Ct. at 2040). Examples of state laws which would not be preempted were laws "against gambling and prostitution as applied to airlines" (*id*). But state laws affecting the denied boarding program involving 50,000 passengers certainly do "relate to" airline services.

> form of preventive relief. The obligation to pay compensation can be, indeed it is designed to be, a potent method of governing conduct and controlling policy."

What concerned the majority in the ninth circuit was the existence of regulation 14 C.F.R. § 250.9. This regulation details what notice an airline must give a passenger concerning the passenger's options in the case of involuntarily denied boarding. The passenger may: 1) accept compensation and thereby discharge the carrier from any further liability or 2) "decline the payment and seek to recover damages in a court of law or in some other manner."[4]

Faced with the notice provision in the regulation that discussed recovering damages "in a court of law or in some other manner," the panel majority chose to invalidate the command of the statute. It found that since the regulation was not " 'contrary' to the statute, it should have controlling authority" (App. A-7, 995 F.2d at 152).

The language of the regulation directly conflicts with § 1305 of the statute. The dissent correctly states that our "first resort must be to the language of the preemption statute itself" (App. A-9; 995 F.2d at 153). "Any attempt

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[4] The majority incorrectly states that passengers have a third option; they may accept the airline's offer of alternate transportation or vouchers (App. A-6, 995 F.2d at 152). Before a passenger is involuntarily denied boarding, the airline seeks volunteers who will agree to leave the flight in exchange, usually, for transportation on the next flight plus a voucher for free travel in the future and/or cash. It is only where the airline cannot encourage enough passengers to leave voluntarily that the involuntary denied boarding regulations apply and the airline is required to offer a cash amount, usually 200% of the value of the remaining flight coupons up to $400 or, at the option of the passenger, vouchers for free future travel (14 C.F.R. § 250.5).

[or oversight] by the FAA to change that result by regulation is contrary to law" (App. A-10; 995 F.2d at 153).

II

The Decision Below Directly Conflicts With the Law of Three Other Circuits

The decision of the ninth circuit directly conflicts with decisions in the fifth, seventh, and District of Columbia circuits. Moreover, a post-*Morales* fifth circuit decision discussing the opinion below declares that "it is difficult to see how [the overbooking claims in *West v. Northwest Airlines*] would not 'relate to' airline 'services.' " *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 356 (5th Cir. 1993).

Pre-Morales Cases

The fifth circuit expressly preempted state law in the case of two loud, boisterous, and intoxicated passengers who were denied seats. *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.) *cert. denied*, 490 U.S. 1106 (1989). Furthermore, that circuit "concluded that § 1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising," a holding which this Court affirmed in *Morales. Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 783 (5th Cir.), *cert denied*, __ U.S. __, 111 S.Ct. 308 (1990), *subsequent decision*, 924 F.2d 1055 (5th Cir. 1991) (Mem.), *aff'd sub nom. Morales v. Trans World Airlines, Inc.*, 504 U.S. __, 112 S.Ct. 2031 (1992).

The decision below is also in conflict with the law in the seventh circuit. In *Illinois Corp. Travel v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert denied*, __ U.S. __, 110 S.Ct. 1948 (1990), a travel agency, which was prohibited from advertising that it discounted the airline's tickets, alleged violations of the state's Consumer Fraud and Deceptive Business Practices Act, as well as state

common law rules such as the prohibition against tortious interference with respective contractual advantage. Holding that state law was expressly preempted, the court stated: "If state law relates to 'rates, routes, or services,' the absence of contrary federal law is irrelevant" (*id.* at 754).

Furthermore, the District of Columbia Circuit in *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987), held that where a blind attorney was denied a seat in an emergency exit row, state law obligations to give courteous service were "expressly preempted" by § 1305.

Post-Morales Cases

In *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir.), *petition for cert filed* No. 93-604 (1993), plaintiff had bought a ticket at a special fare which provided that if she cancelled her flight she would forfeit 10% of the fare. When she cancelled her ticket and applied for a refund, the airline retained not only 10% of the ticket price, but also 10% of the federal tax or $1.25. Statland, like plaintiff West in the case at bar, alleged breaches of her state's consumer fraud and deceptive practices laws. In the case at bar, West complains that he did not receive notice that Northwest was changing its equipment from a larger 727 to a smaller DC-9 or that the DC-9 was overbooked; Statland alleged that she did not receive notice that, in case she applied for a refund, American would retain not only 10% of the ticket price, but also 10% of the tax it collected. The seventh circuit held that under *Morales* "states cannot regulate American's ticket refund practices either by common law or statute" (998 F.2d at 542).

In *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), plaintiff alleged the airline was negligent when several bottles of rum fell out of an overhead bin and

lacerated plaintiff's left arm and wrist causing profuse bleeding. In a considered decision, the court distinguished between preempted economic services which were bargained for between the airline and the passenger (such as ticketing, the provision of food and drink, baggage handling, and boarding procedures), and non-preempted safety related incidents which resulted in bodily injuries. Bodily injury claims, noted the court, have historically been determined by state tort law. In the court's view, "the ADA was concerned solely with economic, not safety deregulation" (4 F.3d at 354). The court noted that economic services generally related to contractual situations, but could also cover "state tort claims" (*id.* at 356).

The court then discussed two tort situations which "would clearly be 'service' regulation within the meaning of §[1305]" (*id.*). *O'Carroll*, *supra*, 863 F.2d 11 (5th Cir. 1989), a wrongful eviction case involving two loud, boisterous, and intoxicated passengers, "undeniably related to the services provided by the airline" (4 F.3d at 356).

Of even more relevance to this petition, the court stated that "the tort and contract claims asserted by the plaintiff in *West v. Northwest Airlines*, 995 F.2d 148 (9th Cir. 1993) would be preempted under our interpretation of 'services' " (*id.*). "Under either *Morales* or the analysis we would prefer, it is difficult to see how a lawsuit for overbooking would not 'relate to' airline 'services' " (*id.*).

In the words of the dissenter in *West*, "Aside from a state law explicitly barring the practice, one strains to conceive of an action which could relate to those services more directly than a lawsuit seeking damages for the inevitable result of those boarding practices — a passenger getting bumped" (App. A-9, 995 F.2d at 153).

Not only is the ninth circuit in conflict with *Morales*, but as just discussed, it is also in conflict with the holdings

of three circuits, as expressed in six decisions both pre and post-*Morales*.

The denied boarding program was federally designed and is applicable to airline passengers throughout the United States. It should be interpreted uniformly. The effect of the decision below is to subject the rights of passengers and airlines to the Balkanizing effects of conflicting state laws.

The conflicting decisions of the lower courts and the importance of the issue warrant additional guidance from this Court.

CONCLUSION

Certiorari should be granted.

Dated: November 18, 1993

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APPENDIX

William D. WEST, Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,
Defendant-Appellee.

No. 89-35820.

United States Court of Appeals, Ninth Circuit.

June 3, 1993.

On Remand from the United States Supreme Court.

Before HUG, D.W. NELSON, and BRUNETTI, Circuit Judges.

The Supreme Court remanded this case ____U.S.____, 112 S.Ct. 2932, 119 L.Ed.2d 558, ____U.S.____, 112 S.Ct. 2986, 120 L.Ed.2d 864, to us for further consideration in light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. ____, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). We hereby withdraw our previous Opinion in this case, filed as amended February 5, 1991, and substitute this Opinion.

Plaintiff-appellant, William D. West ("West"), purchased a ticket to travel on Northwest Airlines, Inc. ("Northwest"). Northwest overbooked West's flight and refused to allow West to board the plane. West brought this action against Northwest for breach of the covenant of good faith and fair dealing under Montana law. The district court granted summary judgment for Northwest on the ground that West's claim was preempted by the Federal Aviation Act. We now affirm in part and reverse in part, and we remand to the district court to determine whether West has a meritorious claim for compensatory damages under Montana law.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 1986, West purchased a non-refundable, non-changeable ticket to travel on Northwest from Great Falls, Montana to Arlington, Virginia. His flight was scheduled to depart Great Falls at 1:30 p.m. and to arrive in Arlington at 9:00 p.m. on October 7, 1986. West confirmed his scheduled departure with his travel agent on October 6, 1986.

Between the date of purchase and the scheduled departure date, Northwest decided to reduce the size of its aircraft from a Boeing 727, which carries 146 passengers, to a DC 9 aircraft, which carries 78 passengers. When West arrived at the check-in gate, a Northwest employee informed him that the flight was overbooked. Northwest attempted to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. However, only three people accepted, and West was unable to board the flight.

Northwest then offered West an alternate flight that would arrive at nearby Dulles Airport at 3:00 a.m. the next morning. West declined to take this flight and made his own arrangements to travel to Arlington at a later date. West subsequently filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law and for unjust discrimination under section 404(b) of the Federal Aviation Act ("FAA"), 49 U.S.C.App. § 1301 et seq., seeking both compensatory and punitive damages on the state and federal claims.

Northwest successfully petitioned the United States District Court to remove the case to the federal court on the basis of diversity of citizenship. Northwest then moved for summary judgment on the grounds that the period for bringing a claim under Section 404(b) had expired and that West's state claim was preempted by the FAA. On September 28, 1989, the district court granted Northwest's motion for summary judgment on both grounds.

West timely appealed only the issue of whether the district court erred in dismissing West's state law claim on the ground that it was preempted by the FAA. This court previously affirmed in part and reversed in part, finding that the FAA preempted West's claim for punitive damages but that it did not preempt his claim for compensatory damages under Montana law.

West then petitioned the Supreme Court for certiorari, claiming that punitive damages were not preempted. Northwest cross-petitioned on the grounds that the state claims for compensatory damages were peempted by the FAA. The Supreme Court waited to decide the petitions until after it decided *Morales*, and then denied West's petition but granted Northwest's and remanded the case to this court to reconsider whether compensatory damages are preempted.

After receiving another petition from West claiming that the Court's rules prohibited it from granting certiorari on a cross-petition but not the initial petition, the Supreme Court vacated its denial of West's petition and granted certiorari on both petitions. It then remanded the case to this court for further proceedings on both questions in light of *Morales*.

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there existed any genuine issue of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

II. Preemption Analysis

In *Morales*, the Supreme Court considered whether or not the Airline Deregulation Act ("ADA"), § 1305(a)(1) of the FAA,

preempted enforcement of a detailed set of guidelines concerning the regulation of airline fare advertising through state consumer protection laws.[1]

The Court held that the ADA expressly preempted the guidelines because their enforcement "relat[ed] to rates, routes, or services of any air cararier. . . ." *Morales*, 504 U.S. at ____, 112 S.Ct. at 2037. The Court interpreted this preemptive clause broadly:

> For purposes of the present case, the key phrase, obviously, is 'relating to.' The ordinary meaning of these words is a broad one . . . and the words thus express a broad pre-emptive purpose.

Id. In crafting this clause, reasoned the Court, Congress intended to preempt state laws which interfered with the goal of deregulation of the airline industry.

In so holding, the Supreme Court invalidated this court's approach to FAA preemption in our original Opinion in this case. Under our pre-*Morales* reasoning, we distinguished between state laws which "merely have an effect on airline services" and those involving an "underlying statute or regulation [which] itself relates to airline services," and held that only the latter are preempted by the ADA. *West v. Northwest Airlines, Inc.*, 923 F.2d 657, 660 (9th Cir.1990). *Morales* directly challenges this analysis.

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[1] These guidelines—the Air Travel Industry Enforcement Guidelines—were promulgated by the Task Force on the Air Travel Industry of the National Association of Attorneys General ("NAAG"). They were intended to govern "the content and format of airline advertising, the awarding of premiums to regular customers (so-called 'frequent flyers'), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights." *Morales*, 504 U.S. at ____, 112 S.Ct. at 2034. According to the NAAG, the regulations "merely explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." *Morales*, *Id.* at ____, 112 S.Ct. at 2041.

We find that, under the reasoning in *Morales*, the ADA preempts West's claim for punitive damages under state contract and tort law, but that it does not preempt his claim for compensatory damages under state law. *Morales* left open the possibility that certain state laws would not be preempted by the ADA even under the broad reading of the preemption clause:

> [W]e do not . . . set out on a road that leads to preemption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising . . . would similarly 'relat[e] to' rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw* [*v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)], '[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect.

Morales, 504 U.S. at ____, 112 S.Ct. at 2040 (citation omitted; brackets in original).

We believe that the state contract and tort laws under which West seeks relief are within that range of statutes too tenuously connected to airline regulation to trigger preemption under the ADA, what the *Morales* court called "borderline questions." *Morales*, however, does not provide much guidance to courts which must decide which state laws fall into this category and which do not.

When it is unclear whether or not a state law comes within the ADA's preemption reach, courts must look outside the controlling statute for guidance. In other contexts, the Supreme Court has held that when the statute is silent or ambiguous courts should turn to agency regulations for clarification.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the

> agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

In the case of the Airline Deregulation Act, the agency regulations interpreting the FAA are particularly illuminating. Title 14 of Code of Federal Regulations implements the FAA, including the deregulation provision. 14 C.F.R. § 250.1 et seq. (1990). Part 250 of that title is a detailed set of rules pertaining to airline "oversales" or overbooking of flights.[2] In the wake of the deregulation legislation, Part 250 was substantially amended, but § 250.9, the provision giving passengers the option of rejecting airline compensation and pursuing a remedy under state law, has not been altered. *See* 47 Fed.Reg. 52980 (Nov. 24, 1982); 46 Fed.Reg. 62285 (Dec. 12, 1981).

This provision expressly contemplates that an injured passenger may seek relief in court for being bumped from an overbooked flight. According to § 250.9(b), the bumped passenger has three options: (1) he may accept the airline's offer of alternate transportation; (2) he may accept airline compensation (in the form of money or a voucher for future travel or some combination of the two); or, (3) "the passenger may decline the payment and seek to recover damages in a court of law or in some other manner." 14 C.F.R. § 250.9(b).

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[2] Both before and after deregulation, this section of the C.F.R. is the only federal regulatory language governing airline bumping. "Under the Airline Deregulation Act of 1978, the Civil Aeronautics Board maintained its former authority over tariffs as to over-booking and in 14 C.F.R. part 250 established the procedures and minimum standards to be followed by the airlines with respect to passengers holding confirmed reservations who are bumped as a result of overselling." *Lopez v. Eastern Airlines, Inc.*, 677 F.Supp. 181, 182 (S.D.N.Y.1988).

This court and at least one other circuit have recognized the controlling authority of this provision in the post-deregulation period. In *Christensen v. Northwest Airlines, Inc.*, 633 F.2d 529 (9th Cir.1980), this court held that a passenger involuntarily denied boarding could not seek a state tort remedy under § 250.9(b) because she had already accepted the airline's offer of alternate transportation. *See also Wasserman v. Trans World Airlines, Inc.*, 632 F.2d 69 (8th Cir.1980) (bumped passenger who accepted alternate transportation is precluded from bringing state claim under § 250.9(b)).

Were we to hold that West's state claims are preempted completely by the ADA, we would eviscerate the third option detailed in the regulation. The plain language of the regulation indicates that passengers retain the option (if they reject alternative flight arrangements, cash, or voucher payment) of pursuing *compensatory* damages in state court. Northwest argues that West is preempted from seeking state remedies but not uniform federal remedies, but the language of § 250.9(b) is broad, referring to damages in "a court of law" generally. Thus, we decline to read such a limitation into this provision. Since this regulation is not "arbitrary, capricious, or contrary" to the statute, it should have controlling authority.

West's right to pursue *punitive* damages in his state claims, however, must be limited. Since punitive damages by their very nature seek to punish the entity against whom they are awarded, such damages awarded in response to bumping resulting from airline overbooking would be contrary to the goals of deregulation. Overbooking and bumping are accepted forms of price competition and reduction in the deregulation period, thus any law or regulation which results in penalizing airlines for these practices is preempted by the FAA.

CONCLUSION

For the foregoing reasons, we find that while West's state claim for punitive damages is preempted by the FAA, his claim for compensatory damages is not. In holding that this portion of

West's state claim for breach of the covenant of good faith and fair dealing is not preempted, however, we do not decide whether West has a valid claim. We leave it to the district court to resolve that remaining issue on remand.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

BRUNETTI, Circuit Judge, concurring in part and dissenting in part:

This panel previously ruled on West's claim for compensatory and punitive damages under Montana law. *West v. Northwest Airlines*, 923 F.2d 657 (9th Cir.1991). In that opinion, we held that West's claim for punitive damages was preempted by the Airline Deregulation Act ("ADA"), § 1305(a)(1) of the FAA, but that his claim for compensatory damages was not. 923 F.2d at 660. The Supreme Court vacated that opinion and remanded the case for reconsideration in light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. ____, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

The majority now reaches the same result as in the original opinion which the Court vacated. Although I concur in the holding that West's claim for punitive damages is preempted by the ADA, I cannot agree that his claim for compensatory damages under state law is not also preempted in light of *Morales*.

The majority arrives at this result by seizing on the caveat at the end of the *Morales* opinion that despite the Court's holding (that the fare advertising guidelines of the National Association of Attorneys General are preempted by the ADA), there may still be some state actions which affect airline rates, routes, or services in so "tenuous, remote, or peripheral a manner" that they need not be deemed preempted by the provisions of the ADA. *Morales*, 504 U.S. at ____, 112 S.Ct. at 2040, *quoting Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983). The majority classifies

West's compensatory damages claim as one such "borderline" action, with sufficiently peripheral effect that we must look to the administrative rules for guidance on whether preemption is proper.

Our first resort must be to the language of the preemption statute itself. The ADA's federal preemption section provides in relevant part:

> [N]o state ... shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier ...

49 U.S.C.A.App. § 1305 (1992). The *Morales* Court made clear that the "relating to" language is to have a very broad scope, encompassing within its reach statutes or actions "having a connection with or reference to airline 'rates, routes, or services.' " *Id.* at ____, 112 S.Ct. at 2037.

We must reach the same result here as the Court reached in *Morales* itself – that the suit is preempted – unless we can say that West's action to recover damages for his being bumped from the flight does not "relate to" airline services. I am unable to reach this conclusion.

An airline's boarding practices certainly come within the ambit of the "airline services" which it provides to its customers. We expressly recognized this in our original opinion. 923 F.2d at 660. Aside from a state law explicitly barring the practice, one strains to conceive of an action which could relate to those services more directly than a lawsuit seeking damages for the inevitable result of those boarding practices – a passenger getting "bumped."

The majority in effect concludes that West's suit is not "related to" airline services. The opinion's invocation of the "tenuous connection" language avoids having to make that statement, but it says the same thing. As I read the case, *Morales*' "tenuous,

remote, or peripheral" language is simply the other side of the "related to" coin. *See* 504 U.S. at ____, 112 S.Ct. at 2040. If an action has too tenuous an effect on airline rates (or services), it is not "related to" those services, and is not preempted by § 1305 of the ADA. I would find that West's action does relate to airline services and is therefore preempted under the ADA.

As the majority points out, the FAA has promulgated a regulation directed to this precise circumstance. *See* 14 C.F.R. § 250.9 (1990). This regulation expressly provides for a "bumped" passenger to elect to seek damages "in a court of law or in some other manner." 14 C.F.R. § 250.9(b). The existence of this regulation, however, does not support a finding that such a suit in state court is not preempted by the ADA.

The fact that the FAA found it necessary to draft regulations addressing the situation of the bumped passenger lends further support to the conclusion that a passenger's suit for damages from that practice "relates to" airline services. In addition, where the act itself sets forth a broad and effective statement of its preemptive effect, the FAA is powerless to create exceptions by way of administrative regulation. I believe that is the case here. Section 1305 of the ADA, in light of the teaching of *Morales*, preempts a state suit for damages for being bumped from a domestic flight. Any attempt by the FAA to change that result by regulation is contrary to law.

To be sure, a finding that West's claim for compensatory damages is preempted by the ADA would obviate 14 C.F.R. § 250.9(b)(3)'s effect, at least as it applies to most *state* actions. However, we can only look to the agency regulations for guidance if there remains some ambiguity after *Morales*.

I do not believe *Morales* leaves room to doubt whether West's claim "relates to" airline services, and I respectfully dissent.

NORTHWEST AIRLINES, INC.,
petitioner, v. William D. WEST.

No. 91-734.

Case below, 923 F.2d 657.

June 8, 1992. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. ____, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

William WEST, petitioner, v.
NORTHWEST AIRLINES, INC.

No. 91-505.

Case below, 923 F.2d 657.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

June 8, 1992. Denied.

William WEST, petitioner, v.
NORTHWEST AIRLINES, INC.

No. 91-505.

Former decision, 112 S.Ct. 2938.

Case below, 923 F.2d 657.

June 22, 1992. Upon consideration of the petition for rehearing, the order entered June 8, 1992, denying the petition for a writ of certiorari is vacated. The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Morales v. Trans World Airlines*, 504 U.S. ____, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

William D. WEST, Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,
Defendant-Appellee.

No. 89-35820.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 13, 1990.

Decided Sept. 11, 1990.

As Amended on Denial of Rehearing and Rehearing En Banc Feb. 5, 1991.

Before HUG, D.W. NELSON and BRUNETTI, Circuit Judges.

D.W. NELSON, Circuit Judge:

Plaintiff-appellant, William D. West (West) purchased a ticket to travel on Northwest Airlines, Inc., (Northwest) from Great Falls, Montana to Arlington, Virginia. Northwest overbooked West's flight and refused to allow West to board the plane. West brought this action against Northwest for breach of the covenant of good faith and fair dealing under Montana law. The district court granted summary judgment for Northwest on the ground that West's claim was preempted by the Federal Aviation Act. We affirm in part and reverse and remand in part to the district court to determine if West has a meritorious claim for compensatory damages under Montana law.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 1986, William D. West purchased a non-refundable, non-changeable ticket to travel on Northwest from Great Falls, Montana to Arlington, Virginia. His flight was scheduled to depart Great Falls at 1:30 p.m. and to arrive in Arlington at 9:00 p.m. on October 7, 1986. West confirmed his scheduled departure with his travel agent on October 6, 1986.

Between the date of purchase and the scheduled departure date, Northwest decided to reduce the size of its aircraft from a Boeing 727, which carries 146 passengers, to a DC 9 aircraft, which carries 78 passengers. Northwest did not inform West or any of Northwest's sales agents of its decision.

When West arrived at the check-in gate, a Northwest employee informed him the flight was overbooked. Northwest attempted to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. However, only three people accepted, and West could not obtain a seat on this flight.

Northwest then offered West an alternative flight that would arrive at Dulles Airport, which is near West's destination, at 3:00 a.m. the next morning. West declined this alternative flight because of its inconvenience and rescheduled his flight to Arlington for approximately two weeks later.

West subsequently filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law and for unjust discrimination under section 404(b) of the Federal Aviation Act (FAA), seeking both compensatory and punitive damages. Northwest successfully petitioned the United States District Court to remove the case to the federal court on the basis of diversity of citizenship.

Northwest then moved for summary judgemnt on the grounds that the period for bringing a claim under Section 404(b), upon which West based his federal claim, had expired and that West's state claim was preempted by the FAA. On September 28, 1989, the district court granted Northwest's motion for summary judgment on both of the above grounds. West timely appealed only the issue of whether the district court erred in dismissing West's state law claim on the ground that it was preempted by the FAA.

DISCUSSION

I. Standard of Review

A grant of summary judment is reviewed de novo to determine, viewing the evidence in the light most favorable to the

nonmoving party, whether there existed any genuine issue of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

II. Federal Preemption

Northwest argues that the federal government's role in regulating the air transportation industry under the FAA preempts Montana's common law duty to deal fairly and in good faith. In examining this issue, we note that when Congress legislates in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships, there is a presumption against finding preemption of state law. *See California v. ARC America Corp*, 490 U.S. 93, 100-01, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989).

There are three ways in which preemption may occur. "Congress may preempt state law expressly by so stating in explicit terms on the face of the statute." *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1318 (2nd Cir.1990) (internal quotations omitted). Second, "when Congress intends that federal law occupy a given field, state law in that field is pre-empted." *ARC America Corp*, 109 S.Ct. at 1665. Finally, even if Congress has not occupied the field, "state law is nevertheless preempted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible." *Id.*

A. Explicit Preemption

The district court found that Congress in the FAA expressly preempted West's state law claims. Specifically the court held that in section 1305(a)(1), "Congress intended to preempt all state statutes and common law rules which affect rates or services involving air travel." We disagree, finding that Congress did not expressly preempt West's state law claim.

Section 1305(a)(1) of the FAA provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates,*

routes, or services of any air carrier." 49 U.S.C.App. § 1305(a)(1) (App.Supp. V 1987) (emphasis added).

Appellant asserts first that section 1305 does not apply because "services" does not include airline boarding practices but is limited in meaning to a description of the types of operations which airlines offer, such as scheduled passenger service, scheduled cargo service, mail service and other specialized services. Thus, under West's reading, section 1305 would preempt state law only when the state law affected the types of services offered. We reject this interpretation.

"The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used." *Hughes Air Corp. v. Public Utilities Com'n*, 644 F.2d 1334, 1337 (9th Cir.1981); *Watt v. Alaska*, 451 U.S. 259, 265, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981). In this case, we believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here. If Congress had intended to limit the word "services" to something other than its common usage, it could easily have used the words "types of services" rather than "services"

Moreover, the Ninth Circuit has already rejected West's definition of services in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir.1984). In *Hingson* the court held that regulation of air carrier seating policies involved regulation of services within the meaning of section 1305(a)(1). *Id.* Thus, the court did not define "services" as merely types of services such as cargo or air ambulance but defined it to include services to customers. Following *Hingson*, we find that Northwest's passenger services, including boarding, are airline services within the meaning of section 1305.

However, while we agree with Northwest that "services" include boarding policies, we disagree with Northwest and the district court that "law[s] . . . relating to airline services" encompass all state laws that affect airline services, however tangentially. This interpretation of § 1305(a)(1) would unduly expand preemption and ignore our presumption against federal

preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted. *See People of State of N.Y. ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y.1989).

Our analysis is consistent ith Ninth Circuit case law. In *Hingson*, a blind person who was not permitted to sit in certain seats during a Pacific Southwest Airlines (PSA) flight brought suit against PSA. Hingson alleged intentional infliction of emotional distress and a claim arising under California Civil Code Section 54.1, which required that handicapped persons be given "full and equal access" to accommodations of all airplanes. *Hingson*, 743 F.2d at 1411, 1415. The Ninth Circuit held that Hingson's claims under California Civil Code Section 54.1 were preempted by section 1305(a)(1). The court reasoned that Section 54.1 was a regulation directly relating to services within the meaning of Section 1305(a)(1). *Id.* at 1415. The court, however, held that Hinson's claim for intentional infliction of emotional distress was not preempted. *Id.* This decision is consistent with our reading of section 1305(a)(1). Hingson's emotional distress claim did involve the airline's passenger services; however, the underlying law, the tort of intentional infliction of emotional distress, was not addressed exclusively to airline service. Thus, § 1305(a)(1) did not preempt.

Likewise, the court in *Air Transport Ass'n v. P.U.C.*, 833 F.2d 200 (9th Cir.1987), *cert. denied*, 487 U.S. 1236, 108 S.Ct. 2904, 101 L.Ed.2d 936 (1988) found that preemption of 1305(a)(1) did not extend to laws that only affected airlines without being directly related to their services. In *Air Transport Ass'n*, airlines and airline trade associations challenged a California regulation prohibiting telephone customers from surreptitiously overhearing or recording conversations. The airlines wished to monitor conversations between their reservation agents and the public. *Air Transport Ass'n*, 833 F.2d at 201-02. The court stated

that the California regulation was not preempted because "[t]he type of telephone operation utilized by the airlines is not peculiar to airlines," and the court could find no evidence that Congress intended to preempt state regulation of utilities when they affected airlines. *Id.* at 207.

Similarly, in the instant case state law simply imposes a duty on all persons entering into contracts to act with good faith and fair dealing. The fact that this duty is applicable to airlines as well as the general public does not invoke federal preemption. We find, therefore, that West's state law claims are not expressly preempted by the FAA.

B. Implied Preemption

In order to show that the FAA impliedly preempts West's claim, Northwest must show that Congress intended that federal law occupy the specific field covered by state law. *ARC America Corp.*, 490 U.S. at 100-01, 109 S.Ct. at 1665. Section 1506 of the FAA, however, clearly indicates that Congress had no such intention. Section 1506 reads: "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 49 U.S.C.App. § 1506 (App.1982). In force since 1938, this section was specifically retained when Congress enacted the Airline Deregulation Act of 1978 which included the preemption section 1305(a)(1). Section 1506 demonstrates Congress' intent not to preempt all common law remedies.[1] Accordingly, we find that Congress did not impliedly preempt West's state law claims under the FAA.

C. Conflict Preemption

Finally, Northwest asserts that West's claim is preempted due to a conflict with federal law. Specifically, Northwest argues that

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[1] Additionally, federal regulations specifically permit a passenger to pursue damages under available state law if they are bumped, 14 C.F.R. § 250.9(b) (1990); this further suggests that Congress had no intention of preempting state common law remedies.

it could not comply both with the federal regulations governing boarding and state common law. We disagree.

Federal airline overbooking regulations specifically contemplate customers choosing between liquidated damages or state common law remedies. 14 C.F.R. § 250.9(b) (1990). Moreover, the Supreme Court has held that common law remedies in overbooking situations do not conflict with federal priority rules for boarding passengers and providing compensation to bumped passengers. *See Nader v. Allegheny Airlines*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976). Permitting a bumped customer to forgo liquidated damages in order to pursue a common law remedy might result in different damage awards, but it would not expose Northwest to liability more than once nor would it prevent Northwest from overbooking. Northwest has offered us no reason to believe that requiring it to conform to Montana's duty of good faith and fair dealing would prevent it from following federal regulations.

However, our holding is limited to West's claim for compensatory damages and does not embrace its punitive counterpart. As stated above, federal regulations contemplate overbooking as an acceptable practice so long as passengers receive compensation. Accordingly, any scheme that *punishes* the practice would be inconsistent with applicable federal law. West's claim for punitive damages is therefore preempted by the FAA.

CONCLUSION

For the foregoing reasons, we find that while West's state claim for punitive damages is preempted by the FAA, his claim for compensatory damages is not. In holding that this portion of West's state claim for breach of the covenant of good faith and fair dealing is not preempted, we are not deciding whether West has a valid claim. We simply hold that the FAA does not entirely preempt West's state claim. We leave it to the district court to resolve all remaining issues on remand.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM D. WEST,

Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,

Defendant-Appellee.

No. 89-35820

D.C. No.
CV 87-63-CCL

OPINION

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
July 13, 1990—Seattle, Washington

Filed September 11, 1990

Before: Procter Hug, Jr., Dorothy W. Nelson and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Nelson

OPINION

NELSON, Circuit Judge:

Plaintiff-appellant, William D. West (West) purchased a ticket to travel on Northwest Airlines, Inc., (Northwest) from Great Falls, Montana to Arlington, Virginia. Northwest overbooked West's flight and refused to allow West to board the plane. West brought this action against Northwest for breach of the covenant

of good faith and fair dealing under Montana law. The district court granted summary judgment for Northwest on the ground that West's claim was preempted by the Federal Aviation Act. We reverse and remand to the district court to determine if West has a meritorious claim under Montana law.

FACTUAL AND PROCEDURAL BACKGROUND

On September 3, 1986, William D. West purchased a non-refundable, non-changeable ticket to travel on Northwest from Great Falls, Montana to Arlington, Virginia. His flight was scheduled to depart Great Falls at 1:30 p.m. and to arrive in Arlington at 9:00 p.m. on October 7, 1986. West confirmed his scheduled departure with his travel agent on October 6, 1986.

Between the date of purchase and the scheduled departure date, Northwest decided to reduce the size of its aircraft from a Boeing 727, which carries 146 passengers, to a DC 9 aircraft, which carries 78 passengers. Northwest did not inform West or any of Northwest's sales agents of its decision.

When West arrived at the check-in gate, a Northwest employee informed him the flight was overbooked. Northwest attempted to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. However, only three people accepted, and West could not obtain a seat on this flight.

Northwest then offered West an alternative flight that would arrive at Dulles Airport, which is near West's destination, at 3:00 a.m. the next morning. West declined this alternative flight because of its inconvenience and rescheduled his flight to Arlington for approximately two weeks later.

West subsequently filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law and for unjust discrimination under section 404(b) of the Federal Aviation Act. (FAA). Northwest successfully petitioned the United States District Court to remove the case to the federal court on the basis of diversity of citizenship.

Northwest then moved for summary judgment on the grounds that Section 404(b), upon which West based his federal claim, had expired and that West's state claim was preempted by the FAA. On September 28, 1989, the district court granted Northwest's motion for summary judgment on both of the above grounds. West timely appealed only the issue of whether the district court erred in dismissing West's state law claim on the ground that it was preempted by the FAA.

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there existed any genuine issue of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

II. Federal Preemption

Northwest argues that the federal government's role in regulating the air transportation industry under the FAA preempts Montana's common law duty to deal fairly and in good faith. In examining this issue, we note that when Congress legislates in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships, there is a presumption against finding pre-emption of state law. *See California v. ARC America Corp*, 109 S. Ct. 1661, 1665 (1989) (internal quotations omitted).

There are three ways in which preemption may occur. "Congress may preempt state law expressly by so stating in explicit terms on the face of the statute." *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1318 (2nd Cir. 1990) (internal quotations omitted). Second, "when Congress intends that federal law occupy a given field, state law in that field is pre-empted." *ARC America Corp*, 109 S. Ct. at 1665. Finally, even if Congress has

not occupied the field, "state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible." *Id.*

A. Explicit Preemption

The district court found that Congress in the FAA expressly preempted West's state law claims. Specifically the court held that in section 1305(a)(1), "Congress intended to preempt all state statutes and common law rules which affect rates or services involving air travel." We disagree, finding that Congress did not expressly preempt West's state law claim.

Section 1305(a)(1) of the FAA provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to rates, routes, or services* of any air carrier." 49 U.S.C. § 1305(a)(1) (App. Supp. V 1987) (emphasis added).

Appellant asserts first that section 1305 does not apply because "services" does not include airline boarding practices but is limited in meaning to a description of the types of operations which airlines offer, such as scheduled passenger service, scheduled cargo service, mail service and other specialized services. Thus, under West's reading, section 1305 would preempt state law only when the state law affected the types of services offered. We reject this interpretation.

"The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used." *Hughes Air Corp. v. Public Utilities Com'n*, 644 F.2d 1334, 1337 (9th Cir. 1981); *Watt v. Alaska*, 451 U.S. 259, 265 (1981). In this case, we believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here. If Congress had intended to limit the word "services" to something other than its common usage, it could easily have used the words "types of services" rather than "services".

Moreover, the Ninth Circuit has already rejected West's definition of services in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984). In *Hingson* the court held that regulation of air carrier seating policies involved regulation of services within the meaning of section 1305(a)(1). *Id.* Thus, the court did not define "services" as merely types of services such as cargo or air ambulance but defined it to include services to customers. Following *Hingson*, we find that Northwest's passenger services, including boarding, are airline services within the meaning of section 1305.

However, while we agree with Northwest that "services" include boarding policies, we disagree with Northwest and the district court that "law[s]. . . relating to airline services" encompasses all state laws that affect airline services, however tangentially. This interpretation of § 1305(a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted. *See People of State of N.Y. ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F.Supp. 162 (S.D.N.Y. 1989).

Our analysis is consistent with Ninth Circuit case law. In *Hingson*, a blind person who was not permitted to sit in certain seats during a Pacific Southwest Airlines (PSA) flight brought suit against PSA. Hingson alleged intentional infliction of emotional distress and a claim arising under California Civil Code Section 54.1, which required that handicapped person be given "full and equal access" to accommodations of all airplanes. *Hington*, 743 F.2d at 1411, 1415. The Ninth Circuit held that Hingson's claims under California Civil code Section 54.1 were preempted by section 1305(a)(1). The court reasoned that Section 54.1 was a regulation directly relating to services within the meaning of Section 1305(a)(1). *Id.* at 1415. The court, however, held that Hingson's claim for intentional infliction of emotional distress was not preempted. *Id.* This decision is consistent with our reading of

section 1305(a)(1). Hingson's emotional distress claim did involve the airline's passenger services; however, the underlying law, the tort of intentional infliction of emotional distress, was not addressed exclusively to airline service. Thus, § 1305(a)(1) did not preempt.

Likewise, the court in *Air Transport Ass'n v. P.U.C.*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 1988 found that preemption of 1305(a)(1) did not extend to laws that only affected airlines without being directly related to their services. In *Air Transport Ass'n*, airlines and airline trade associations challenged a California regulation prohibiting telephone customers from surreptitiously overhearing or recording conversations. The airlines wished to monitor conversations between their reservation agents and the public. *Air Transport Ass'n*, 833 F.2d at 201-02. The court stated that the California regulation was not preempted because "[t]he type of telephone operation utilized by the airlines is not peculiar to airlines," and the court could find no evidence that Congress intended to preempt state regulation of utilities when they affected airlines. *Id.* at 207.

Similarly, in the instant case state law simply imposes a duty on all persons entering into contracts to act with good faith and fair dealing. The fact that this duty is applicable to airlines as well as the general public does not invoke federal preemption. We find, therefore, that West's state law claims are not expressly preempted by the FAA.

B. Implied Preemption

In order to show that the FAA impliedly preempts West's claim, Northwest must show that Congress intended that federal law occupy the specific field covered by state law. *ARC America Corp.*, 109 S. Ct. at 1665. Section 1506 of the FAA, however, clearly indicates that Congress had no such intention. Section 1506 reads: "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

49 U.S.C. § 1506 (App. 1982). In force since 1938, this section was specifically retained when Congress enacted the Airline Deregulation Act of 1978 which included the preemption section 1305(a)(1). Section 1506 demonstrates Congress' intent not to preempt all common law remedies.[1] Accordingly, we find that Congress did not impliedly preempt West's state law claims under the FAA.

C. Conflict Preemption

Finally, Northwest asserts that West's claim is preempted due to a conflict with federal law. Specifically, Northwest argues that it could not comply both with the federal regulations governing boarding and state common law. We disagree.

Federal airline overbooking regulations specifically contemplate customers choosing between liquidated damages or state common law remedies. 14 C.F.R. § 250.9(b) (1990). Moreover, the Supreme Court has held that common law remedies in overbooking situations do not conflict with federal priority rules for boarding passengers and providing compensation to bumped passengers. *See Nader v. Allegheny Airlines*, 426 U.S. 290 (1976). Permitting a bumped customer to forgo liquidated damages in order to pursue a common law remedy might result in different damage awards, but it would not expose Northwest to liability more than once nor would it prevent Northwest from overbooking. Northwest has offered us no reason to believe that requiring it to conform to Montana's duty of good faith and fair dealing would prevent it from following federal regulations.

CONCLUSION

For the foregoing reasons, we find that West's state claim is not preempted by the FAA. In holding that West's state claim

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[1] Additionally, federal regulations specifically permit a passenger to pursue damages under available state law if they are bumped, 14 C.F.R. § 250.9(b) (1990); this further suggestes that Congress had no intention of preempting state common law remedies.

for breach of the covenant of good faith and fair dealing is not preempted, we are not deciding whether West has a valid claim. We simply hold that the FAA does not preempt West's state claim. We leave it to the district court to resolve all other issues on remand.

REVERSED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG. 20, 1993
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

WILLIAM D. WEST, Plaintiff-Appellant, v. NORTHWEST AIRLINES, INC., Defendant-Appellee.	No. 89-35820 USDC NO. CV 87-63-CCL O R D E R

Before: HUG, NELSON AND BRUNETTI.

Judges Hug and D.W. Nelson voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Brunetti voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL -7 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

WILLIAM D. WEST, Plaintiff-Appellant, v. NORTHWEST AIRLINES, INC., Defendant-Appellee.	No. 89-35820 USDC No. CV 87-63-CCL O R D E R

Before: HUG, D.W. NELSON and BRUNETTI, Circuit Judges.

The parties are requested to each file a supplemental brief on the application of *Morales v. Trans World Airlines, Inc.*, No. 90-1604, 1992 WL 112335 (U.S. Tex.) to this case, within ten days of the date of this order.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN-4 1991
CATHY A. CATTERSON, CLERK

WILLIAM D. WEST, Plaintiff-Appellant, v. NORTHWEST AIRLINES, INC., Defendant-Appellee.	No. 89-35820 USDC No. CV 87-63-CCL O R D E R

Before: HUG, NELSON AND BRUNETTI.

Upon consideration of Appellant West's petition for rehearing, the court vacates the portion of our February 5, 1991 order and amended opinion which granted the appellee's petition for rehearing. The decision, as amended, stands. The petitions for rehearing are DENIED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35820
CT/AG#: CV-87-63-CCL

WILLIAM D. WEST,
Plaintiff-Appellant

v.

NORTHWEST AIRLINES, INC.,
Defendant-Appellee

MANDATE
ISSUED
JUL-5 1991

FILED
JUL 10 1991
LOU ALEKSIC
By DIANNE
E. MANTZ
Deputy Clerk

TRANS WORLD AIRLINES, INC.;
AMERICAN AIRLINES, INC.
Amici Curiae

APPEAL FROM the United States District Court for the USDC - Helena, Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the USDC - Helena, Montana and was duly submitted.

ON CONSIDERATION WHEREOF It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 10 1991
CATHY CATTERSON, CLERK
U.S. COURT OF APPEALS

WILLIAM D. WEST,

Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,

Defendant-Appellee.

No. 89-35820
USDC No.
CV 87-63-CCL

O R D E R

Before: HUG, D.W. NELSON and BRUNETTI, Circuit Judges.

The motion to recall the mandate is DENIED.

The June 4, 1991 order merely vacated that portion of the February 5, 1991 opinion which granted the petition for rehearing. The rest of the February 5, 1991 opinion stands, including the discussion on punitive damages.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

****

FILED
SEP 28 1989
LOU ALEKSICHM, JR. CLERK
by Dianne M. Spooner
Deputy Clerk

WILLIAM D. WEST,

Plaintiff,

-v-

NORTHWEST AIRLINES, INC., a corporation,

Defendant.

CV 87-63-H-CCL
MEMORANDUM
AND
ORDER

****

This action arises out of a claim by plaintiff West that defendant Northwest Airlines allegedly subjected West to unjust discrimination, undue or unreasonable preference or disadvantage when it denied West a boarding pass on flight number 1150 in Great Falls, Montana, on October 7, 1986.

West relies upon § 404(b) of the Federal Aviation Act (hereinafter FAA) 49 U.S.C. 1374(b) to provide a federal private cause of action for unjust discrimination. Additionally, West alleges that a private state cause of action for breach is available under state law because defendant unduly or unreasonably gave preference or disadvantage in denying West a boarding pass for flight number 1150 and because the defendant did not follow its own policy in offering compensation to West when he was denied a boarding pass.

Before the court is the defendant's motion for summary judgment. The motion has been fully briefed and the parties were heard in open court September 15, 1989 at which time plaintiff West and defendant Northwest appeared and argued through their respective counsel. The court now rules on the motion.

Summary judgment is properly granted under Rule 56(c) if the "pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *California Architectural Building Products, Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting Rule 56(c), Fed. R. Civ. P.), *cert. denied*, 108 S.Ct. 698 (1988). The initial burden is upon the party seeking summary judgment to inform the court of the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once this is accomplished, the non-moving party is invested with the obligation to go beyond the pleadings and show that there is a genuine issue for trial. *Id.* Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). "[T]o withstand a motion for summary judgment, the non-moving party must show that there are 'genuine factual issues that can only be resolved by a finder of fact because they may reasonably be resolved in favor of either party.' " *Id.*, 106 S.Ct. at 2511.

Defendant's motion to dismiss raises two issues of law; first, that plaintiff West's denial of a boarding pass occurred on October 7, 1986, and the federal statute on which West bases his federal claim, 49 U.S.C. 1374(b), had expired January 1, 1983, making the plaintiff's federal claim non-existent, and, second, that West's state claims are preempted by 49 U.S.C. 1305(a).

In this case, the court concludes that the plaintiff cannot withstand defendant's motion for summary judgment because the plaintiff fails to establish a private cause of action under

the Federal Aviation Act. The court also concludes that the plaintiff's state law claims are precluded by the preemption section of the FAA. Furthermore, there is no dispute over facts that would affect the outcome of the suit under the governing law.

FACTS

The facts considered in a light most favorable to the plaintiff show that on September 3, 1986, West purchased a non-refundable, non-changeable ticket to travel on Northwest Airlines from Great Falls, Montana, to Washington National Airport in Arlington, Virginia, on October 7, 1986. The flight was to depart Great Falls at 1:30 p.m., and arrive Washington National at 9:00 p.m. on October 7, 1986. Between the date of purchase and the date of Mr. West's planned travel, Northwest Airlines decided to reduce the size of its aircraft from a Boeing 727-200 which carries 146 passengers to a DC 9 aircraft which carries 78 passengers. Northwest did not inform West or any of Northwest's sales agents of its decision. When West arrived at the check-in gate, a Northwest Airlines employee informed him the flight was overbooked. Subsequently, Northwest made attempts to make room for West and other passengers by requesting volunteers to deplane in exchange for certain payments. Although three people accepted, there remained no room for Mr. West on flight number 1150. Northwest Airlines then offered West an alternate flight which would arrive at Dulles Airport at 3:00 a.m. West declined to accept the alternate flight because of its inconvenience and rescheduled his flight to Washington National for sometime later. Northwest Airlines gave West a copy of its "Denied Boarding Regulations" and gave him a check for $198.00, twice the purchase price of his one-way ticket. West subsequently filed his claim in state court and the defendant petitioned the United States District Court to remove the case to the federal court pursuant to 28 U.S.C. § 1332 and § 1441.

Private Right of Action under 404(b) of the Federal Aviation Act, 49 U.S.C. 1374(b).

Plaintiff West argues that the Federal Aviation Act (FAA) grants private citizens such as himself the right to enforce

perceived violations by air carriers through private causes of action.* According to West, this right is provided by 404(b) of the FAA, 49 U.S.C. 1374(b), and subsequent case law interpreting that federal statute. *See Mahoney v. Air France*, 474 F.Supp. 531 (S.D.N.Y., 1979), *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C.C.A., 1975), *Fitzgerald v. Pan American World Airways*, 229 F.2d 449, (2d Cir. 1956), *Mortimer v. Delta Airlines*, 302 F. Supp. 276, (N.D. Ill. 1969), and *Hingson v. Pacific Southern Airlines*, 743 F.2d 1408 (9th Cir. 1984).

Although the court understands some of the plaintiff's frustration with Northwest's treatment of him, the plaintiff fails to establish a federal cause of action on which the court can decide a claim. Effective January 1, 1983, the Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1705, repeated all of Section 404(b). West does not provide any legal authority or theory on how to establish his private claim when the statute on which he relies has expired. Every case to which the plaintiff points for authority was decided *prior* to the expiration of 404(b) except for *Hingson, supra*. However, in *Hingson*, the plaintiff's cause of action accrued in September, 1980, nearly three years before 404(b) ceased to be effective. Furthermore, the *Hingson* court was careful to point out that although the statute on which the plaintiff relied was in effect at the time of his claim, it had expired January 1, 1983, as a result of the Airline Deregulation Act of 1978. *Id.*, fn. 1 at 1411. The likely purpose of footnote 1 is to prevent the use of the case as authority for claims which arise after January 1, 1983. *See also, Ramirez de Arellano v.*

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* At oral argument, plaintiff West seemed to circumvent the issue of private cause of action and argued instead that his claim was actually a state claim. According to West, it was the defendant who maintained there was a federal cause of action by forcing removal of the case to federal district court. Nevertheless, the court is compelled to respond to the claims which the plaintiff has set forth in his brief in opposition to defendant's motion for summary judgment. Moreover, plaintiff's amended complaint alleges that Northwest's willful overbooking violates Department of Transportation regulations and constitutes oppressive bad faith. The court construes this to mean that the plaintiff is attempting to enforce by private action regulations which have been enacted pursuant to the Federal Aviation Act.

Eastern Airlines, Inc., 629 F.Supp. 189 (D. Puerto Rico 1985) ("Since the incident which gives rise to the alleged federal discrimination claim occurred on May 23, 1983, plaintiff's federal statutory action is allegedly nonexistent as a matter of law. We agree. Section 1374(b) has definitely been eliminated as of January 1, 1983.") and *see Diefenthal v. C.A.E.*, 681 F.2d 103, (5th Cir. 1982).

Since 404(b) has expired, the court can only hypothesize how the plaintiff's claim might be reconstituted under the FAA to determine if a private cause of action can be found. One possible theory would be that since the expiration of 404(b), there may be an implied private right under the remaining § 404(a) which requires air carriers to provide "safe and adequate service."

At least one appellate court has considered this question and found that following the expiration of 404(b), 404(a) cannot be given a new interpretation to provide a private cause of action. *Anderson v. U.S. Air, Inc.*, 818 F.2d 49 (D.C. Cir., 1987). Although *Anderson* involved a blind person whom the airline had denied transportation after he refused to vacate the seat next to an emergency exit, the issue presented by the claim was whether Congress intended that violations of § 404(a) could be remedied by aggrieved individuals or solely by the administrative agencies charged with enforcement of the statute. To discern whether Congress intended private citizens to enforce the FAA, the court applied the "intent test" of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975). The court found the required intent was absent from the remaining section of 404 and noted in particular that phrasing a statute in general terms rather than specifically identifying the benefitted class indicates a lack of intent. *Anderson* at 54. (Citing one of the factors the Supreme Court has recognized when determining intent). Comparing the remaining 404(a) to the expired 404(b), the court stated: "section 404(b) *which prior to its repeal in 1983 had been interpreted to provide a private right of action*, see e.g. *Nader v. Allegheny Airlines, Inc.*, (citations omitted; emphasis added), specifically names the entities protected from 'unjust discrimination' . . . . Given the marked difference in phrasing between section 404(a) and 404(b), it is evident Congress was as fully capable

of specifying 'especial' beneficiaries in the former as it did in the latter." *Id.* at 54.

Moreover, the *Anderson* court found the existence of an extensive and detailed scheme of administrative enforcement as evidence that Congress intended the administrative agencies, not private citizens, to enforce violations of the FAA. *Id.*, citing *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983). This court agrees with the court's analysis in *Anderson*.

Plaintiff West's appropriate remedy then is to pursue his claim through the Department of Transportation and the Federal Aviation Administration, who are the enforcers of the FAA. The absence of private remedy does not mean the airlines have a license to mistreat or to inadequately serve passengers, it only means an agency, rather than an individual, is empowered to bring suit directly against an airline. *Id.* at 55.

II. *West's State Claims*

Plaintiff West argues that even if his federal cause of action fails, the Federal Aviation Act does not preempt his state claim based upon unjust discrimination or undue or unreasonable prejudice or disadvantage. The plaintiff argues that this discrimination, prejudice, or disadvantage resulted in a breach of the defendant's duty to deal fairly and in good faith which is a common law claim under Montana law. Section 105(a)(1) of the FAA provides:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this chapter to provide air transportation. 49 U.S.C. § 1305(a).

The Ninth Circuit has held that by this section of the FAA, Congress intended to preempt all state statutes and common

law rules which affect rates or services involving air travel. *Hingson*, supra, *see also Air Transport Ass'n v. P.U.C. of the State of Cal.*, 833 F.2d 200 (9th Cir. 1987); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986). *Anderson v. U.S. Air*, 818 F.2d 49 (D.C. Cir. 1987).

In addition, the Supreme Court has found that the Congress has "through the [FAA], regulated aviation extensively." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 106 S.Ct. 2369, 2372, 91 L.Ed.2d 1 (1986). Finally, where the claim is based on an implied duty of good faith and fair dealing which requires an examination of the expectations of the parties and the state imposed duties, the claim is preempted by federal law. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1982).

Therefore, for the reasons set forth herein, Defendant Northwest Airlines' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that the Final Pretrial Conference scheduled for September 29, 1989, and the trial setting for October 2, 1989, are hereby vacated.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 28 day of September, 1989.

/s/

CHARLES C. LOVELL
United States District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

IN CIVIL DOCKET
SEP 28 1989
LOU ALEKSICH, JR.,
CLERK
By /s/_____
Deputy

United States District Court

HELENA DIVISION DISTRICT OF MONTANA

WILLIAM D. WEST,

JUDGMENT IN A CIVIL CASE

V.

NORTHWEST AIRLINES, INC.
a corporation

CASE NUMBER:
CV-87-63-H-CCL

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant Norwest Airlines' motion for summary judgment is GRANTED, and that plaintiff take nothing, that the action be dismissed on the merits.

September 28, 1989
Date

LOU ALEKSICH, JR.
Clerk

/s/
(By) Deputy Clerk

14 C.F.R. § 250.9 (1991) reads:

(a) Every carrier shall furnish passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space immediately after the boarding occurs, a written statement explaining the terms, conditions, and limitations of denied boarding compensation, and describing the carriers' boarding priority rules and criteria. The carriers shall also furnish the statement to any person upon request at all airport ticket selling positions which are in the charge of a person employed exclusively by the carrier, or by it jointly with another person or persons, and at all boarding locations being used by the carrier.

(b) The statement shall read as follows:

COMPENSATION FOR DENIED BOARDING

If you have been denied a reserved seat on (name of air carrier) you are probably entitled to monetary compensation. This notice explains the airline's obligation and the passenger's rights in the case of an oversold flight, in accordance with regulations of the U.S. Civil Aeronautics Board.

VOLUNTEERS AND BOARDING PRIORITIES

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his or her will until airline personnel first ask for volunteers who will give up their reservation willingly, in exchange for a payment of the airline's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily in accordance with the following boarding priority of (name of air carrier): (In this space carrier inserts its boarding priority rules or a summary thereof in a manner to be understandable to the average passenger.)

COMPENSATION OF INVOLUNTARY DENIED BOARDING

If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless:

(1) You have not fully complied with the airline's ticketing, check-in, and reconfirmation requirements, or you are not acceptable for transportation under the airline's usual rules and practices, or (2) you are denied boarding because the flight is canceled; or (3) you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons; or (4) you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or (5) the airline is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face values of their ticket coupons, with a $200 maximum. However, if the airline cannot arrange "alternate transportation" (see below) for the passenger, the compensation is doubled ($400 maximum). The "value" of a ticket coupon is the one-way fare for the flight shown on the coupon including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's final destination or first 4-hour stopover are used to compute the transportation.

"Alternate transportation" is air transportation (by an airline licensed by the CAB) or other transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger's next scheduled stopover (of 4 hours or longer) or final destination no later than 2 hours (for flights within U.S. points, including territories and possessions) or 4 hours (for international flights) after the passenger's originally scheduled arrival time.

METHOD OF PAYMENT

The airline must give each passenger who qualifies for denied boarding compensation a payment by cash or check for the

amount specified above, on the day and place the involuntary denied boarding occurs. However, if the airline arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment shall be sent to the passenger within 24 hours. The air carrier may offer free tickets in place of the cash payment. The passenger may, however, insist on the cash payment, or refuse all compensation and bring private legal action.

PASSENGER'S OPTIONS

Acceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

No. 93-803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

WILLIAM D. WEST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN RESPONSE TO PETITION

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December 1993

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the court of appeals correctly hold that common law tort and contract claims seeking compensatory damages from an airline are not preempted by section 105 of the Federal Aviation Act, as that provision was construed in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-803

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

WILLIAM D. WEST,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN RESPONSE TO PETITION

Northwest Airlines seeks review on the grounds that the decision below (1) conflicts with this Court's decision in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), and (2) conflicts with decisions from other circuits addressing the preemptive scope of section 105 of the Federal Aviation Act (49 U.S.C. App. § 1305).

We dispute Northwest's first point because the court of appeals correctly decided that Mr. West's claim for compensatory damages is not preempted under *Morales*. We do not, however, contest the thrust of Northwest's second point (though our analysis of the cases differs somewhat), because the circuits have analyzed the pre-emption question presented here in different ways. A decision by this Court would thus provide important guidance on an issue which

Morales did not address, *i.e.*, how precisely to identify which tort and contract claims are preempted by section 105 and which ones are not. Accordingly, we do not oppose Northwest's petition and submit that if it is granted, the Court should also grant our cross-petition, which raises the companion issue of whether a state law claim for punitive damages is preempted.

In the discussion below, we first explain why *Morales* involved a situation so distinct from the more typical tort and contract cases that additional guidance from this Court would be useful. We then address the differing approaches which the federal appellate courts have taken. Finally, we explain why, even though we do not oppose review, Northwest errs in arguing that the compensatory damages portion of the decision below conflicts with *Morales*.

1. *Morales* held that section 105 of the Federal Aviation Act, which preempts state laws "relating to" an airline's "routes, rates, or services," barred 34 state attorneys general from using state laws against deceptive practices to regulate airline advertising, explaining that section 105 was enacted as part of the Airline Deregulation Act of 1978, which was designed to give airlines greater pricing freedom. 112 S. Ct. at 2039-40.

Morales explained that its reading of section 105 was informed by Congress's use of the broad "relating to" formulation that appears in the preemption provision of the Employment Retirement Income Security Act ("ERISA"). *Morales* also looked to ERISA preemption principles when it added that section 105 does not preempt every state law that "relates to" airline routes, rates or services at some abstract level because a number of state laws operate "'in too tenuous, remote, or peripheral a manner' to have preemptive effect." *Id.* at 2040, *quoting Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983). Because state efforts to regulate airline advertising did not present a "borderline" case, the Court saw no need to articulate a standard for determining which state laws are preempted by section 105 and which ones survive. *Id.*

Further guidance regarding possible preemption of traditional tort and contract claims would be useful primarily because *Morales* involved an atypical set of facts -- an unprecedented attempt by 34 states to regulate airline advertising. As a result, and as the Ninth Circuit noted here, *Morales* "does not provide much guidance to

courts" when they face preemption defenses in the more typical tort or contract case involving an airline (Pet. App. A-5). The Fifth Circuit has echoed this sentiment, noting that "until recently, no one even supposed that section 1305 preempts state tort claims," but "the airlines have begun to argue that various state-law tort claims are expressly preempted" by section 105 "in the wake of *Morales*." *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 352 (1993).

This case, unlike *Morales*, presents section 105 preemption issues in a context where they more typically arise, and a ruling from this Court would be helpful in establishing how far section 105 reaches. Further guidance with respect to these garden-variety tort and contract claims would be particularly useful because they raise issues which this Court did not have to address in *Morales*.

First, *Morales* noted that the states' inability to regulate fare advertising would not "give the airlines carte blanche to lie to and deceive consumers," citing section 411 of the Federal Aviation Act (49 U.S.C. App. § 1381), which empowers the federal government to enjoin unfair or deceptive airline advertising, 112 S. Ct. at 2040, as well as enforcement guidelines issued by the Department of Transportation regarding advertising. *See* 14 C.F.R. §§ 399.80 - .88. But neither section 411 nor any other provision of that Act allows the recovery of damages for tort or contract claims, as this Court noted in *Nader v. Allegheny Airlines, Inc.* 426 U.S. 290, 302 (1976), which also involved the right of a bumped passenger to pursue state law claims.

Federal courts have generally not recognized the existence of federal common law tort or contract remedies in an aviation context. *Compare Moragne v. United States Marine Lines, Inc.*, 398 U.S. 375 (1970)(recognizing federal common law remedy in maritime area).[1] Thus, to the extent that traditional state law remedies are preempted by section 105, there may be no federal remedy to take their place. The elimination of state tort and contract remedies in this fashion would affect not only the rights of passengers, but

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[1] Indeed, the only opinion suggesting that federal common law exists in this area appears to be *Stevenson v. American Airlines, Inc.*, Civ. No. 92-785, 1992 WL 396792 (E.D. Pa. 23 December 1992), which involved a claim based on the in-flight death of a prize-winning dog.

airlines and third parties as well. *See Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1407-09 (D. Colo. 1989)(section 105 preempts Frontier's breach of contract claim against United over the way that Frontier's fares and flight offerings are loaded into a computer reservation system developed by United).

Second, and along the same line, *Morales*'s reading of section 105 looked to ERISA preemption principles, yet when ERISA preempted state law remedies, it simultaneously created a comprehensive scheme of federal remedies for individual plaintiffs. This case thus poses the question of the extent to which courts should look to ERISA for guidance in deciding which common law remedies are preempted by section 105 when Congress has not enacted comparable federal remedies.

Third, the case raises more starkly than did *Morales* the issue of how to read section 105 in light of the general savings clause in section 1106 of the Federal Aviation Act, which expressly preserves "the remedies now existing at common law or by statute," 49 U.S.C. App. § 1506, which was enacted in 1938 and which Congress did not alter when it added section 105 in 1978.

Finally, *Morales* involved state laws that "relate to" airline *"rates"* because they sought to dictate how those "rates" would be advertised. Here, by contrast, we deal with a state law claim that supposedly "relates to" airline *"services"* in a manner that section 105 forbids, and there is no consensus in the case law as to what "services" that provision preempts.

These factors make this case sufficiently important to warrant review of Northwest's petition and our cross-petition; we now turn to the case law construing section 105 in light of *Morales*.

2. The post-*Morales* appellate opinions show how preemption issues have arisen in various factual settings and with different analytical approaches, although most courts have ruled (as the Ninth Circuit did here) that traditional state law remedies are not preempted on the ground that they "relate to" airline "services" in a manner forbidden by section 105. Thus, one set of cases involves tort claims when passengers are killed or injured, which claims have always been pursued under state law (except in international accidents where the Warsaw Convention governs). Two circuits have held

that section 105 did not eliminate airline liability under state law in those cases. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *Public Health Trust of Dade County v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). Various district courts have agreed. *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318 (E.D. Mich. 1993); *Butcher v. City of Houston*, 813 F. Supp. 515 (S.D. Tex. 1993); *Burke v. Northwest Airlines, Inc.*, 819 F. Supp. 1352 (E.D. Mich. 1993).

The Fifth Circuit, by contrast, has been of two minds on this issue. In *Hodges v. Delta Airlines, Inc., supra*, that court opined that section 105 should not preempt a tort claim by a passenger who was seriously injured after being hit by luggage that fell from the overhead bin. The court did not rule for the passenger, however, because it deemed itself bound by an unpublished opinion from another panel in that circuit which held that a passenger could not pursue a personal injury claim based on a flight attendant's "negligently stomping on a passenger's foot." 4 F.3d at 355. That unpublished opinion stated that any claim that "arises out of the services" of an airline is preempted, *id.*, an approach that *Hodges* deemed unduly broad, concluding that the better approach would be to limit preemption to "services" that are part of the bargain that is struck between passenger and airline. *Id.* at 350. *Hodges* also took the unusual step of suggesting that the issue should be reheard *in banc* to resolve the conflicting views within that circuit, and a suggestion of *in banc* rehearing has been filed. *See also Smith v. America West Airlines*, 4 F.3d 356, 357 (5th Cir. 1993)(same unpublished opinion, as law of the circuit, requires preemption of negligence claim brought by passenger on hijacked aircraft; second panel notes that allowing such a claim to proceed may not interfere with airline services in a way that section 105 forbids).

Post-*Morales* appellate cases which do not involve death or personal injury have produced more varied results, although the weight of authority is against preemption. In *Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir. 1993), the court held that section 105 did not preempt a Texas law insofar as it allowed an airline mechanic to sue his employer for money damages based on retaliation for his seeking benefits under that state's workers' compensation statute. Similarly, the Ninth Circuit found here that

section 105 did not preempt Mr. West's state law claim for compensatory damages under the theory that Northwest had breached an implied covenant of good faith and fair dealing. That court found that this claim was too "tenuous, remote, or peripheral" to Northwest's operations to be preempted under *Morales*, noting that federal overbooking rules expressly preserved state law remedies for passengers in Mr. West's situation.

Northwest argues (at 10-11) that the ruling below conflicts with two pre-*Morales* cases, but they are plainly distinguishable. *Illinois Corp. Travel v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990), involved an effort to regulate advertising of discount fares, a situation specifically covered by *Morales*. In *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987), the court stated in *dictum* that section 105 would preempt a purported state law claim that an airline failed to provide "courteous service" when it refused to seat a blind passenger in an emergency exit row. We do not quarrel with that limited finding of preemption, although we submit that the proper analysis would have been to ask whether state laws seeking to regulate emergency evacuation procedures conflict with federal safety rules issued under other sections of the Federal Aviation Act.[2]

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[2] An example of the correct analysis appears in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989), which held that the air safety provisions of the Act preempt a state law barring drug testing for pilots. That methodology is preferable to going through contortions to show that state tort claims somehow "relate to" airline "services" in a way that Congress envisioned when it enacted section 105. The same analysis could apply to preempt other state law claims without addressing section 105, for example, a claim that a passenger was falsely arrested because the pilot refused to let him disembark a delayed flight.

We make two distinct points here. First, the question presented here is not whether state common law remedies, *as a body*, are or are not preempted. *Morales* plainly teaches that some are, while others are not, and the only issue is how and where to draw the line. Second, one need not distort the intent or language of section 105 in order to conclude that specific claims are preempted because other provisions of the Act may properly and more easily produce the same result.

The only post-*Morales* appellate ruling that is arguably out of step with the results in other post-*Morales* cases is *Statland v. American Airlines, Inc.* 998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. ___ (1993)(No. 93-604). The plaintiff in *Statland* sued in federal court for a $1.25 refund, on the theory that when an airline exacts a cancellation penalty which is stated as a percentage of the total fare (including a ten percent federal ticket tax), the airline must return that portion of the penalty which reflects the amount paid as tax. The district court dismissed the suit *sua sponte* for lack of subject matter jurisdiction and declined to exercise supplemental jurisdiction over the passenger's state law claims for breach of fiduciary duty, violation of Illinois' consumer fraud statute, conversion and breach of contract.

The Seventh Circuit affirmed the finding of no subject matter jurisdiction; it then reached out to decide whether section 105 preempts the passenger's state law claims "in order to conserve the resources of Illinois state courts." 998 F.2d at 541. In a brief discussion, the court of appeals deemed it "obvious that canceled ticket refunds relate to rates" within the meaning of section 105, which does not allow states to "regulate American's ticket refund practices either by common law or by statute. This sweeps aside Statland's state law claims." *Id.* *Statland* did not analyze or even cite the Ninth Circuit's decision here in reaching this conclusion.

It might be argued that technically no conflict exists between *Statland* and this case because (1) *Statland* involved ticket refund practices, whereas this case involves overbooking, and (2) the plaintiff in *Statland* was pursuing claims for conversion, breach of fiduciary duty and the like, whereas Mr. West is pursuing a different claim for breach of an implied covenant of good faith and fair dealing. One might also argue that the Seventh Circuit's preemption discussion is *dictum*, since the court conceded that there was no need for it to reach the issue, and Illinois state courts may well reach the opposite conclusion.[3] Finally, one might argue that

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[3] Indeed, the Illinois Supreme Court is presently considering the application of section 105 to various state law claims involving changes in an airline's frequent flyer program in another case which this Court remanded for further consideration in light of *Morales*. In its first decision in that

Morales is barely a year old, that any tension between the approach here and in *Statland* is tolerable at this time, and that the Court should not step in until lower courts have had additional opportunity to formulate approaches for divining which state law claims are preempted by section 105 and which ones are not.

While such arguments might counsel against granting review in other situations, we submit that the lack of guidance provided by *Morales* and the varying approaches taken by lower courts in its wake argue in favor of granting review here. *Statland*'s broad reading of section 105 suggests that the Seventh Circuit would find claims such as Mr. West's preempted. In fact, the Fifth Circuit in *Hodges* noted its disagreement with the result reached by the Ninth Circuit here, stating in a conclusory fashion that state law claims involving overbooking "relate to" airline "services" in a way that requires their preemption by section 105. 4 F.3d at 356. That *dictum* suggests that wherever the Fifth Circuit may draw the line between preempted and non-preempted claims, Mr. West's claim would be preempted in that circuit.

3. Although we do not oppose review being granted, we in no way concede that Mr. West's claim is preempted or that the decision below conflicts with *Morales*. Northwest's argument on this point proceeds on the erroneous assumption that Mr. West is seeking to dictate what "services" Northwest offers the public and that section 105 preempts such regulation. Not so. Here, as in *Nader v. Allegheny Airlines, supra*, the state law claim focuses on inadequate notice about the alleged "service" being offered without trying to regulate any "service" the airline chooses to offer.

Moreover, there are several reasons why Mr. West's claim does not relate to any "services" that section 105 preempts. First, cases such as *Hodges* which have grappled with the question of how to construe that provision have curiously overlooked the fact that Congress used the words "service" and "services" quite narrowly in other provisions of the Federal Aviation Act to describe various

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case, the Illinois court held that such claims were not preempted by section 105. *Wolens v. American Airlines, Inc.*, 147 Ill. 2d 367, 168 Ill. Dec. 133, 589 N.E.2d 533 (1991), *vacated and remanded*, 113 S. Ct. 32 (1992). The case has been reargued and is awaiting a decision.

types of airline operations, *e.g.*, scheduled passenger flights, cargo charter flights, air ambulances, intrastate flights, etc.[4]

This narrow reading of "services" is consistent with Congress's goal in the Deregulation Act of preventing the states from trying to dictate only on what "routes" an airline can fly or what "rates" to offer, but also what type of "services" it planned to operate. There was surely no intent to displace state law as broadly as Northwest argues here, and a case which nicely illustrates the reach of section 105 is *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 389 N.W.2d 507 (Minn. 1986), which held that section 105 barred the state from licensing air ambulance companies which sought to offer that "service" to the public, although the state could regulate areas traditionally left to them, such as qualifications of medical personnel employed by an air ambulance company.

Second, even if the word "services" may properly be construed to mean one thing in section 105 and another thing elsewhere in the Act, an alternative interpretation, embraced by the Fifth Circuit in *Hodges*, does not preempt Mr. West's claim here. This alternative interpretation of "services" in section 105 rests on an interpretative rule issued by the Civil Aeronautics Board in which the Board stated that section 105 preempts "all of the economic factors that go into the provision of the *quid pro quo* for passenger's [sic] fare." 44 Fed. Reg. 9948, 9951 (15 February 1979), *quoted in Hodges, supra*, 4 F.3d at 354. Even under this standard, however, Mr. West's claim does not challenge any part of the "service" bargain. The thrust of his claim is failure to provide accurate notice of what

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[4] Thus, section 404(a) of the Act (49 U.S.C. App. § 1374(a)) imposes on airlines a duty to provide "safe and adequate service, equipment and facilities," as well as "reasonable through services" with airline offering connecting flights. Section 401(e)(6) (49 U.S.C. App. § 1371(e)(6)) states: "Any air carrier, other than a charter air carrier may perform charter trips (including inclusive tour charter trips), or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board." Despite these provisions, the Ninth Circuit took a broad view of the word "services," deeming itself bound by a more expansive reading of that word in a prior decision in that circuit (Pet. App. E-4).

exactly was being offered.

Finally, no conflict exists between the ruling below and *Morales* because, as that case observed, section 105 was enacted to "ensure that the States would not undo federal deregulation with regulation of their own." 112 S. Ct. at 2034. No such interference will occur here, and in any event, it is difficult to see how the federal interest is somehow compromised when, as the court of appeals noted, federal rules promulgated under another provision of the Federal Aviation Act require airlines to advise bumped passengers of their right to pursue whatever common law remedies are available to them, advice that would be meaningless and misleading if, as Northwest argues, no such remedies exist (Pet. App. A-5 - A-7).

CONCLUSION

For these reasons and those stated in our cross-petition, the petition and cross-petition should be granted.

Respectfully submitted,

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